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# Bills and Notes-Negotiability-Accelerating Time of Payment

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## RECENT CASE NOTES

**BILLS AND NOTES—NEGOTIABILITY—ACCELERATING TIME OF PAYMENT—**Plaintiff as indorsee brought suit against defendant as endorser without first suing the maker of the note or joining the maker in the suit on the following promissory note: "Ninety days after date I promise to pay to the order of Guio & Mumma, one hundred and twenty-five and no/100 dollars, negotiable and payable at First National Bank, Brownstown, Indiana, with interest at rate of 8% per annum and attorneys fees. For value received without any relief from valuation and appraisal laws. The drawers and indorsers severally waive presentment, protest and non-payment of this note. The express condition of the sale of one No. 4 Rosenthal corn husker and one Pratt tractor for which this note is given is such that title and ownership of the above described property does not pass from said Guio and Mumma until this note with interest is paid in full. *Guio and Mumma has full power to declare this note due, and take possession of said property at any time they may deem this note insecure, even before the maturity of the same.*" Defendant contended that the clause in the note, italicized above, made the note non-negotiable and the evidence showed that plaintiff did not first exercise due diligence against the maker. *Held*, note non-negotiable, and being non-negotiable, due diligence must first be used against the maker before suing an indorser. The court said, "The clause objected to in this suit gave the payees the power to declare the note payable at any time they deemed themselves insecure. The maturity of the note depended only upon the determination by the payees that they were insecure. When that would happen no one could ascertain by an examination of the note."<sup>1</sup>

Burns 11360, 1926, provides: "An instrument to be negotiable must conform to the following requirements: \* \* \* 3. Must be payable on demand or at a fixed or determinable future time." Burns Sec. 11363, 1926, provides: "An instrument is payable at a determinable future time within the meaning of this (negotiable instruments) act which is expressed to be payable, 1. At a fixed period after date or sight; or 2. *On or before a fixed or determinable future time specified therein*; or 3. On or at a fixed period after the occurrence of a specified event which is certain to happen." The principal case is one of first impression in this state and clearly the weight of authority is with it as is pointed out in the opinion.<sup>2</sup> But upon a clear, logical interpretation of the Negotiable Instruments Act, and from analogy of other accelerating events and their relation to the instrument and the holder or maker, it is submitted that the decision should be the other way—viz., that where the note is payable upon a day certain with the added clause that the holder has an option to

<sup>1</sup> *Guio v. Lutes*, Appellate Court of Ind., Feb. 16, 1933, 184 N. E. 416.

<sup>2</sup> *Reynolds v. Vint*, 73 Ore. 528, 144 Pac. 526; *Great Falls Nat. Bank v. Young*, 67 Mont. 328, 215 Pac. 651 (1923); *Puget Sound State Bank v. Washington Paving Co.*, 94 Wash. 504, 162 Pac. 370 (1917); *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Anno. Cas. 1912D 1; *Peoples Bank v. Porter*, 58 Cal. App. 41, 208 Pac. 200 (1922); *First State Bank of Cheyenne v. Barton*, 129 Okla. 67, 236 Pac. 142; *Murrell v. Exchange Bank*, 168 Ark. 645, 271 S. W. 21, 44 A. L. R. 139 (1925).

declare the note due at any time he deems himself insecure, the same should be negotiable.

It has been pointed out that there are four general types of acceleration in commercial paper, all bearing a relationship between the accelerating event and the holder or maker.<sup>3</sup>

1. Where the acceleration is wholly within the control of the maker.
2. Where the acceleration is within the control of the maker plus the power on the part of the holder to exercise an option and declare the instrument due.
3. Where the accelerating event is in the control of neither the maker nor the holder.
4. Where the acceleration is wholly within the control of the holder.

Of these four classes the courts are almost uniform in upholding the negotiability of paper conforming to classes one, two, and three, and are practically unanimous in declaring paper coming under class four non-negotiable.

*Class 1.* It has been held that a note payable "Within one year after date" was negotiable.<sup>4</sup> The statute itself provides a note payable "on or before" a certain date is negotiable.<sup>5</sup> Here the power to accelerate is wholly within the control of the maker, though for negotiation purposes such a note is regarded as payable on the date named in the instrument and only gives the maker an option to accelerate the time of payment.<sup>6</sup> If the maker chooses to exercise his option and payment is accepted the note is paid, unless it is left in circulation and comes in the hands of a bona fide holder before the named date of payment, in which case the maker will have to pay a second time,<sup>7</sup> being in the same position as one who has paid a demand note and left it in circulation.<sup>8</sup>

*Class 2.* In those cases in which the acceleration is due to the act or failure to act on the part of the maker plus an exercise of an option on the part of the holder, the courts have upheld the negotiability. Probably the most typical of this class is one in which the maker has power to declare the whole of an installment note due upon default of any one installment.<sup>9</sup> The exercise of such an option is wholly within the control of the holder and he may waive it or "exercise by demand, suit, foreclosure, and similar acts."<sup>10</sup> Provisions in noninstallment notes that if the semi-annual interest is not paid the whole principal and interest becomes due at the option of the holder does not affect negotiability.<sup>11</sup>

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<sup>3</sup> *Ralph W. Aigler* in 22 Mich. Law Rev. 710.

<sup>4</sup> *Leader v. Plante*, 95 Me. 339, 85 Am. St. Rep. 415, 50 Atl. 54; *Lowell Trust Co. v. Pratt*, 183 Mass. 379, 67 N. E. 363.

<sup>5</sup> Burns' Anno. Stat. 11363, 1926, subs. 2.

<sup>6</sup> *Mattison v. Marks*, 31 Mich. 421 (1885).

<sup>7</sup> *Fogg v. School District of Sedalia*, 75 Mo. App. 159 (1898).

<sup>8</sup> *State v. Wells, Fargo & Co.*, 15 Cal. 336 (1880).

<sup>9</sup> *Dorbecker v. Brandt C. Downey Co.*, 88 Ind. App. 557, 163 N. E. 535; *Schmidt v. Pegg*, 172 Mich. 159, 137 N. W. 524; *Ashland Bldg. & Loan Co. v. Kerman*, 23 Ohio App. 127, 155 N. E. 245; *LaDue v. Budd*, 51 S. D. 507, 215 N. W. 490.

<sup>10</sup> *Chaffee "Acceleration in Time Paper"*, 32 Har. L. Rev. 766.

<sup>11</sup> *Arnett v. Clark*, 22 Ariz. 409, 198 Pac. 127. See also *Utah St. Nat. Bank v. Smith*, 18 Colo. 1, 179 Pac. 160; *Winn v. La Hart*, 155 Minn. 307, 193 N. W. 587, where a note secured by a mortgage was accelerable on default of mortgage terms.

*Class 3.* A note payable in one year or "if crop \* \* \* is below eight bushels per acre this note shall be extended one year" was held negotiable.<sup>12</sup> A trade acceptance providing in margin "Should maker \* \* \* suffer a fire loss \* \* \* this trade acceptance at option of holder shall become due and payable" was held negotiable.<sup>13</sup> A note payable in twelve months or before if made out of the sale of a machine was held negotiable.<sup>14</sup>

*Class 4.* It is only the class of commercial paper that provides for acceleration where the power to accelerate is wholly within the control of the holder that is held non-negotiable. Why this should be is hard to see. Certainly the Statute does not so discriminate. The language is broad, being "on or before a fixed or determinable future time." In fact such language would seem to include this type of instrument. Nothing is said that should permit the maker to accelerate and not also include an acceleration controlled by the holder. To admit the negotiability of the other three types mentioned in this note and exclude the fourth type seems to be a wholly illogical construction of the statute. In a demand note the power to declare the note due is wholly within the control of the holder.

The crux of the situation seems best stated by Prof. Ralph W. Aigler in 22 Mich. Law Review 710. "If certainty is required, as primarily it is believed to be, so that the paper may be computed with reasonable business precision as to its money value and so steps may be taken to hold parties secondarily liable, there is much more reason for objecting to acceleration provisions depending on the maker's whim."

I. D. P.